IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 4:05-CV-329-GKF-PJC**
	:	
TYSON FOODS, INC., *et al.*,	:	
	:	
Defendants.	:	

STATE OF OKLAHOMA'S BENCH BRIEF REGARDING THE ADMISSION OF PUBLIC RECORDS PURSUANT TO FED. R. EVID. 803(8)(C)

Plaintiff, the State of Oklahoma ("the State"), hereby submits this bench brief to assist the Court with its evidentiary rulings involving the public records and reports exception to the hearsay rule pursuant to Federal Rule of Evidence 803(8).[1]

Discussion

I. Public Records, Reports, Statements, and Data Compilations Are Presumed Admissible, and Defendants as the Objecting Parties Bear the Burden To Demonstrate the Unreliability of Such Evidence.

Fed. R. Civ. P. 803(8) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .
>
> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an

[1] The State notes that the trial exhibits giving rise to Defendants' in-court presentation on September 30, 2009, regarding Rule 803(8), which included a PowerPoint presentation and citation to and distribution of previously undisclosed case law, were disclosed to Defendants on Monday, September 21, 2009. Despite having these trial exhibit designations for some nine days, Defendants waited until the morning of their use to raise this issue.

> investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed. R. Evid. 803(8). This brief focuses on that category of documents identified in subsection (C), namely, "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." Fed. R. Evid. 803(8)(C).

Government reports "***are, with their opinions, conclusions, and recommendations, presumed admissible*** under rule 803(8)(C), unless [the party opposing their admission] demonstrates the reports' untrustworthiness." *Hernandez v. City of Albuquerque*, No. CIV 02-0333, 2004 U.S. Dist. LEXIS 30820, at *8 (D.N.M. Jan. 24, 2004) (emphasis added). Rule 803(8) "is based upon the assumption that public officers will perform their duties, that they lack motive to falsify, and that public inspection to which many such records are subject will disclose inaccuracies." 30B Michael H. Graham, Federal Practice & Procedure Evidence § 7049 (2009). "Since the assurances of accuracy are generally greater for public records than for regular business records, ***the proponent is usually not required to establish their admissibility through foundation testimony***." 5-803 Weinstein's Federal Evidence § 803.10[2] (2009) (emphasis added).

There are three requirements for a document to be admissible under Rule 803(8)(C)[2]:

(1) the report was prepared pursuant to authority granted by law;
(2) the evidence constitutes factual findings; and
(3) circumstances do not indicate the report is untrustworthy.

[2] As a threshold matter, "[t]he foundation for a public record or report need only establish that the document is authentic and that it contains one of the three types of matters specified in the rule. It is not necessary to show that the public record or report was regular or made at or near the time of the event recorded." Steve Goode & Olin Guy Wellborn III, Courtroom Handbook on Federal Evidence 461 (West 2008).

Perrin v. Anderson, 784 F.2d 1040, 1046-47 (10th Cir. 1986); *accord In re Cessna 208 Series Aircraft Prods. Liab. Litig.*, No. 05-md-1721, 2009 U.S. Dist. LEXIS 78504, at *17 (D. Kan. Sept. 1, 2009) (citing *Perrin* and *Flannery Props. v. Byrne*, Nos. 98-1122 & 98-1134, 216 F.3d 1087 (table) (2000 U.S. App. LEXIS 12090 (10th Cir. May 30, 2000)). These requirements are addressed in turn.

Element 1: The Public Office or Agency Prepared the Report Pursuant to Authority Granted by Law

The first factor under Rule 803(8)(C) requires that the report have been prepared pursuant to authority granted by law. *Perrin*, 784 F.2d at 1046. Notably, "express statutory authority is not required under the public records exception." *United States v. Cinergy Corp.*, 495 F. Supp. 2d 909, 912 (S.D. Ind. 2007). Instead, Rule 803(8)(C) "can apply if the agency investigates and reports on matters ***within its general area of responsibility***." *See id*. (emphasis added; internal quotation marks omitted); *cf. Flannery Props.*, 2000 U.S. App. LEXIS 12090, at *13 (affirming district court's decision not to admit report by Colorado state real estate commission in part because Colorado Supreme Court expressly had held that commission was not fact-finder). Thus, any requirement that there be any express statutory directive that the work contained in the report be conducted is not supported by the Rule.

In *Marsee v. United States Tobacco Co.*, 866 F.2d 319 (10th Cir. 1989), the court affirmed the district court's decision not to admit reports published by the International Agency for Research on Cancer ("IARC") and the Consensus Development Conference of the National Institute of Health ("NIH"). *Id*. at 324-25. The IARC report was prepared by scientists from various countries and the NIH report was prepared "by a panel of scientists and non scientists after a conference at which invited speakers presented papers concerning different aspects of smokeless tobacco." *Id*. at 325. The Tenth Circuit concluded that neither reflected "the findings

of a governmental agency authorized by law to report on the adverse health effects of smokeless tobacco." *Id*. The trial court, however, had admitted a report of the Surgeon General's Advisory Committee as an "authoritative, exhaustive study by a public agency." *Marsee v. United States Tobacco Co.*, 639 F. Supp. 466, 470 (W.D. Okla. 1986).

Element 2: The Evidence Constitutes "Factual Findings," Which Is Broadly Construed

"***The term 'factual findings' is construed broadly and includes 'conclusions and opinions found in evaluative reports of public agencies***.'" *In re Cessna*, 2009 U.S. Dist. LEXIS 78504, at *17 (quoting *Perrin*, 784 F.2d at 1047); *see also Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 166-67 (1988) (holding that Rule 803(8) did not preclude admission of opinions and conclusions regarding Navy plane crash). "Accordingly ***'factual finding' includes not only what happened, but how it happened, why it happened, and who caused it to happen***." Graham, *supra* § 7049 (emphasis added).

By definition, the factual findings and underlying data set forth in an evaluative report are admissible as part of that report. *See* Fed. R. Evid. 803(8) (providing hearsay exception for "records, reports, statements, or *data compilations*" (emphasis added)); *cf. Wilson v. Merrell Dow Pharmaceuticals, Inc.*, 893 F.2d 1149, 1154 n.6 (10th Cir. 1990) (noting that information used to create graphs on charts came "from sources that are recognized as trustworthy under Rule 803," namely, "FDA data" and "information from the CDC") (dicta); *Elwood v. City of New York*, 450 F. Supp. 846, 872 (S.D.N.Y. 1978) ("On the trial of this action, plaintiffs sought to have admitted into evidence a report, issued by the New York State Department of Environmental Conservation. . . . The factual material contained in the report is clearly admissible. . . ." (citing Fed. R. Evid. 803(8)(C)), *rev'd on other grounds*, 606 F.2d 358 (2d Cir. 1979).

In addition, the general rule is that "factual findings" must be based upon the knowledge or observations of the preparer of the report, as opposed to second-hand knowledge, such as statements made by third parties. Weinstein's, *supra*, § 803.10[4][a]. But government officials may rely on colleagues or subordinates who have the requisite knowledge. Weinstein's, *supra*, § 803.10[3][a]; *see, e.g., United States v. Central Gulf Lines, Inc.*, 974 F.2d 621, 626-27 (5th Cir. 1992) (finding admissible reports prepared by surveyors with personal knowledge of facts who had duty to report them to public official). For example, in *Hicks v. Corrections Corp. of America*, No. CV08-0687-A, 2009 U.S. Dist. LEXIS 83158 (W.D. La. Mar. 27, 2009), the district court concluded that "The Surgeon General's reports on smoking and tobacco have also been held admissible in federal court pursuant to the public records hearsay exception in Fed. Rules of Evid. rule 803(8), since the reports are prepared pursuant to the Surgeon General's legal obligation to report new and current information on smoking and health to the U.S. Congress. . . . *See also, Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988) ('factually based conclusions or opinions [in investigative reports] are not on that account excluded from the scope of Rule 803(8)(C)'); 2 McCormick on Evidence, § 296(C) Investigative Reports (6th ed.) (citing Boerner)."

Element 3: Circumstances Do Not Indicate That the Report Is Untrustworthy

To reiterate, public records, reports and data compilations enjoy a presumption of trustworthiness. *E.g.*, *Hernandez*, 2004 U.S. Dist. LEXIS 30820, at *8. Accordingly, courts require specific evidence of a lack of trustworthiness. *Perrin*, 784 F.2d 1047; *see also Kalamazoo River Study Group v. Rockwell Intern.*, 3 F. Supp. 2d 799, 813-14 (W.D. Mich. 1998) (finding no evidence that water testers were unqualified or that their tests results were affected by any bias), *rev'd in part on other grounds*, 228 F.3d 648 (6th Cir. 2000); *Kehm v. Procter &*

Gamble Mfg. Co., 724 F.2d 613, 619 (8th Cir. 1983) (indicating that challenge to methodology of government report, and evidence rebutting report's conclusions, are issues of weight and credibility). The Advisory Committee Notes to Rule 803(8) identify four nonexclusive factors for courts to consider in determining the trustworthiness of a report:

(i) the timeliness of the investigation;
(ii) the investigator's skill and experience;
(iii) whether a hearing was held; and
(iv) possible bias when reports are prepared with a view to possible litigation.

To be admissible, the report need not satisfy all four requirements. *See* 2 McCormick on Evidence, § 296.

Again, Defendants as the objecting parties bear the burden of proof to demonstrate that the report lacks trustworthiness. *Hernandez*, 2004 U.S. Dist. LEXIS 30820, at *8. Attorney argument is not evidence. *See, e.g., U.S. v. Taylor*, 514 F.3d 1092, 1095, 1100 (10th Cir. 2008).

II. Multiple Hearsay Is Dealt with Flexibly in the Context of Rule 803(8)

The admissibility standard of Rule 803(8) also captures government reports that include hearsay. Indeed, "[t]he mere fact that a 'report includes third party statements does not render them inadmissible hearsay." *Hernandez*, 2004 U.S. Dist. LEXIS 30820, at *14. As stated by the district court in *Hernandez*, "most Courts have considered the multiple hearsay problem somewhat flexibly under Rule 803(8), given the strong presumption that public reports are reliable. Thus, if the Court finds that the person with firsthand knowledge had no reason under the circumstances to misrepresent information to the public official, the report will probably be found admissible -- even though there was, strictly speaking, no duty to report to the public agency or means of verification, and even though no specific hearsay exception or non-hearsay use is applicable." *Hernandez*, 2004 U.S. Dist. LEXIS 30820, at *14 (internal quotation marks

omitted) (addressing double hearsay involving "third party statements on which the investigators relied").

"As the court stated in *Rodriguez v. City of Houston*, 250 F. Supp. 2d 691, 700 n.2 (S.D. Tex. 2003): Defendant objects to [the Internal Affairs Division Investigative Report], in its entirety, arguing that it contains multiple levels of hearsay and is not material or relevant to any issue in this action. This objection is without merit. The disputed Internal Affairs Division Report contains 'factual findings resulting from an investigation made pursuant to authority granted by law.' Fed. R. Evid. 803(8). Defendant has not shown that 'the sources of [the] information' in this report 'lack … trustworthiness,' and the report is, therefore, admissible.'" *Hernandez*, 2004 U.S. Dist. LEXIS 30820, at *16 (quoting *Rodriguez*, 250 F. Supp. 2d at 700 n.2). *See also Wilson*, 893 F.2d at 1154 n.6 (dicta) ("We do note, however, that the information used to create the graphs on the charts came from sources that are recognized as trustworthy under Rule 803. Dr. Goddard determined the number of Bendectin tablets distributed using FDA data that appears to be admissible under the public records exception of Rule 803(8). Doctors Goddard and Lamm calculated the rate of birth defects using information from the CDC, whose data has been ruled to be admissible under Rule 803(8) as well.").

Additional examples, from the jurisprudence of the Second, Fourth, and Fifth Circuit Courts of Appeals and the Northern District of Iowa, are provided below.

In *Ellis v. International Playtex Inc.*, 745 F.2d 292 (4th Cir. 1984), the Fourth Circuit reversed the exclusion of a report by the Centers for Disease Control and Prevention ("CDC") concerning toxic shock syndrome, despite the fact that it was based on information compiled from doctors nationwide concerning symptoms suffered by their patients. The court acknowledged that the reporting doctors had no absolute duty to report reliably to the CDC, that

the CDC did not verify the doctors' reports for accuracy, and that the doctors' statements were not subject to a specific hearsay exception. The court nonetheless found that under the circumstances, there was no conceivable motive for the doctors to misrepresent information to the CDC. Thus, the defendant could not overcome the strong presumption of trustworthiness attached to the public report, and its admission was affirmed.

In *Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300, 1305-1306 (5th Cir. 1991), the Fifth Circuit held that a HUD report was admissible under Rule 803(8), reasoning that, although Rule 803 is concerned with hearsay because of the general distrust of out-of-court declarants, Congress has created a presumption that this distrust should generally not apply to public officials performing their legal duties. *Id.* at 1305-1306; *see also id.* at 1310 ("[Many] government reports, as with many expert witnesses, have to rely in part on hearsay evidence, and the reports are not generally excluded for this reason. Under Rule 703, experts are allowed to rely on evidence inadmissible in court in reaching their conclusions. There is no reason that government officials preparing reports do not have the same latitude."). *Accord In re Oil Spill by The Amoco Cadiz*, 954 F.2d 1279, 1308 (7th Cir. 1992) ("Rule 803(8) is a multi-level exception, in the footsteps of its common law precursors.").

Similarly, in *In re Air Disaster at Lockerbie Scot.*, 37 F.3d 804, 828 (2d Cir. 1994), the Second Circuit provided the following analysis:

> Appellants object to the admission of the detective's testimony and his report. Based on his analysis of passenger records and information obtained from passengers' and crew members' friends and relatives, Henderson determined that the Samsonite bag containing the bomb was an unaccompanied bag from the Frankfurt flight. Defendants moved to exclude his reports as based on multiple layers of hearsay; Henderson had compiled his reports based upon other officers' reports of interviews they had conducted in this necessarily lengthy and involved investigation.
>
> We believe the evidence was properly received under Fed. R. Evid. 803(8)(C) . . . . *See also Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167, 102 L. Ed. 2d 445, 109

> S. Ct. 439 (1988) (upholding broad admissibility of facts in government reports, unless circumstances demonstrate lack of trustworthiness). . . .
>
> Here there was no explicit finding of trustworthiness, but no such finding is required before an official report under Rule 803(8)(C) may be received. The plain language of the rule establishes general admissibility, unless a report is deemed to be untrustworthy. *See* Fed. R. Evid. 803(8) advisory committee's note; *Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613, 618 (8th Cir. 1983).

Id. at 828.

Further, in *Kehm v. Procter & Gamble Co.*, the defendants contended that certain materials constituting factual findings under Rule 803(8)(C) must nevertheless be excluded on grounds of multiple hearsay. The district court responded as follows:

> Although the multiple hearsay problem has been mentioned with regard to Rule 803(8)(C) . . . it has generally been held that the author of the report or decision is not necessarily required to have first-hand knowledge of the facts upon which his findings are based. *United States v. Smith*, 172 U.S. App. D.C. 297, 521 F.2d 957 (D.C. Cir. 1975); *Fraley v. Rockwell International Corp.*, 470 F. Supp. 1264, 1267 (S.D. Ohio 1979). Where the trial judge finds the investigative findings to be reliable, their admissibility under Rule 803(8)(C) is warranted even if the findings are not the result of the direct personal knowledge of the author of the findings. 4 Weinstein's Evidence, para. 802(8)[03], at 803-203-04. Thus, the multiple hearsay issue is reducible to one of the trustworthiness of the factual findings.

Kehm v. Procter & Gamble Co., 580 F. Supp. 890, 901 (N.D. Iowa 1982) (internal quotation marks omitted).

Defendants' reliance on *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816 (10th Cir. 1981), is misplaced. Although the Tenth Circuit affirmed the district court's refusal to admit a Colorado Civil Rights Commission report, in doing so, the Court stated that "[t]he jury was presented substantial admissible evidence on the matter and given a full statistical explanation of the events. There seems little probative value in either the CCRC determination or Crow's opinion on whether discrimination existed. Moreover, there is a real possibility that the jury would give

undue deference to such evidence." *Id.* at 822. Here, of course, those same concerns do not apply.

In sum, based on the well-reasoned authority cited above, reports, statements, and data compilations by a public office or agency are admissible under Fed. R. Civ. P. 803(8), even in the presence of multiple hearsay.

III. Though an Open Question in the Tenth Circuit, the Better-Reasoned Decisions Hold That *Daubert*/Rule 702 Should Not Apply to Public Reports, Statements, and/or Data Compilations Otherwise Falling Within Rule 803(8)(C).

Defendants' urging on the Court to perform a *Daubert*-type analysis on various reports, statements and/or data compilations prepared by public agencies is misguided.

Although there is no binding decision by the Tenth Circuit on this issue, well-reasoned decisions from other jurisdictions are instructive, holding that *Daubert* does not apply in the context of Rule 803(8). The Fourth Circuit wisely views Rules 702 (i.e., *Daubert*) and 803(8) as alternative bases for the introduction of scientific or technical findings of fact:

> Phelps & Associates also challenges the admission of a Mecklenburg County tax assessment, offered to prove the value of Galloway's property. It argues that the assessment contained undisclosed expert testimony, i.e., a real estate appraisal, subject to the gatekeeper provisions of Federal Rule of Evidence 702 and Daubert. . . . ***We conclude, however, that the assessment could appropriately have been admitted under the agency records exception to the hearsay rule, Fed. R. Evid. 803(8),*** which holds such documents sufficiently reliable because they represent the outcome of a governmental process and were relied upon for nonjudicial purposes.

Christopher Phelps & Assocs., LLC v. Galloway, 492 F.3d 532, 542 (4th Cir. 2007) (emphasis added).

Likewise, an Eastern District of Missouri decision lends support to the conclusion that public records are not subject to *Daubert*:

> Next the parties engage in a dispute concerning the impact of Fed. R. Evid. 803(8)(C) on the admissibility of these reports. . . . [P]laintiff argues that the reports are unreliable and riddled with errors and so should be excluded. ***This***

> **Daubert-*esque attack on these official reports is unpersuasive***. Plaintiff's arguments do not demonstrate a 'lack of trustworthiness' in the reports. Plaintiff is free to attempt to rebut portions of the reports' contents with contrary evidence.

Cedar Hill Hardware & Constr. Supply, Inc. v. Ins. Corp., No. 4:04-cv-743, 2006 U.S. Dist. LEXIS 16970, at *2-*3 (E.D. Mo. Apr. 5, 2006) (emphasis added).

A district court in the Western District of Michigan has stated that "contentions that [challenged] tests are invalid and not representative, ***go to the scientific accuracy of the tests***. ***These are issues that go to the weight to be accorded to the evidence, not to its admissibility***." *Kalamazoo River Study*, 3 F. Supp. 2d at 813-14 (finding no evidence that water testers were unqualified or that their tests results were affected by any bias); *see also Elwood*, 450 F. Supp. at 872 ("On the trial of this action, plaintiffs sought to have admitted into evidence a report, issued by the New York State Department of Environmental Conservation. . . . The factual material contained in the report is clearly admissible. . . ."), *rev'd on other grounds*, 606 F.2d 358 (2d Cir. 1979). And the Eighth Circuit has indicated that a challenge to the methodology of a government report, and evidence rebutting the conclusions of those reports, are issues of weight and credibility for the trier of fact. *Kehm*, 724 F.2d at 619.

Defendants' reliance on the Tenth Circuit decision in *Simek v. J.P. King Auction Co.*, 160 Fed. Appx. 675, 686 (10th Cir. 2005), is misplaced. As a threshold matter, the *Simek* decision is unpublished and therefore is "not precedential" pursuant to 10th Circuit Rule 32.1.

In addition, the Court in *Simek* relied on, among others, the Ninth Circuit's decision in *Desrosiers v. Flight International of Florida, Inc.*, 156 F.3d 952 (9th Cir. 1998) (affirming refusal to admit entire 700-800 report, but ultimately admitting almost all findings of fact), and *Heary Brothers Lightning Prot. Co. v. Lightning Prot. Inst.*, 287 F. Supp. 2d 1038 (D. Ariz. 2003). Even in *Desrosiers* and *Heary Brothers*, however, ***the objecting parties***, in challenging a

government report, had the burden to present sufficient evidence – and not just stated objections – to permit a finding that the report contained untrustworthy opinions. *Desrosiers*, 156 F.3d at 961-62; *Heary Bros.*, 287 F. Supp. 2d at 1076.

Further, although couched in terms of *Daubert*, the *Desrosiers* and *Heary Brothers* courts' decisions are actually grounded in the indicia of trustworthiness attendant to Rule 803(8)(C). *See* Fed. R. Evid. 803(8) advisory committee's note. In *Desrosiers*, for example, the Ninth Circuit concluded that the author of the report did not have the requisite skill or experience. Therefore, although the trial court properly had admitted "almost all 'Findings of Fact' in the [accident] report," 156 F.3d at 961-62, it did not err in excluding the investigator's opinions because:

> [The investigator] did not attend aviation accident reconstruction school until after completing the JAG report; 2) he had no formal training in aircraft accident investigation; 3) this was the first JAG aircraft accident report Lt. Hamilton ever prepared; and 4) Lt. Hamilton never reviewed the avionics maintenance records before issuing the report. . . .

Id.

Likewise, the *Heary Brothers* court principally based its decision to exclude a "technical manual" regarding the efficacy of lightning protection systems upon the court's conclusion that the report was not the product of its author's own investigation (i.e., the report contained double hearsay). Specifically, the author had compiled the findings of third parties, and the court found that "the 'sources of information . . . indicate[] lack of trustworthiness.'" *See* 287 F. Supp. 2d at 1076. The court added: "[T]here are no affirmative guarantees within the Technical Manual that the author has the expertise to evaluate the lightning tests, nor that the author undertook a comprehensive or reliable investigation of the scientific validity of lightning protection systems."

Id. Again, these are not *Daubert* factors. They are the indicia of trustworthiness attendant to Rule 803(8)(C). *See* Fed. R. Evid. 803(8) advisory committee's note.

In short, a *Daubert*-type analysis should not be applied to government reports otherwise admissible under Fed. R. Evid. 803(8). Even if such an analysis were to apply, Defendants as the objecting parties bear the burden – even under the authority cited by Defendants – to demonstrate unreliability, through the presentation of evidence and not attorney argument.[3]

IV. State's Exhibit 5107 Is Admissible Under Rule 803(8)(C).

At the request of the Court, the State clarifies its position with respect to State's Exhibit 5107. In light of the principles articulated above, and the presumed admissibility and reliability of government reports, statements, and data compilations under Fed. R. Evid. 803(8)(C), the State submits that State's Exhibit 5107 should be admitted in its entirety. As stated above, Defendants bear the burden to demonstrate – not just by attorney argument, but by evidence – that such report lacks sufficient trustworthiness to be considered by the Court. Defendants have not met their burden. In addition, while claiming that such report contains hearsay within hearsay, the authorities identified in Section II *supra* instruct that government reports are nonetheless admissible even when they contain multiple hearsay. *See, e.g.*, *Hernandez v. City of Albuquerque*, No. CIV 02-0333, 2004 U.S. Dist. LEXIS 30820, at *14 (D.N.M. Jan. 24, 2004).

***

[3] Even if not admissible under Fed. R. Evid. 803(8), at a minimum, the proffered government reports should be admitted for the purpose of showing that pollution from land application of poultry waste in the IRW was known or knowable to each of Defendants and was an entirely foreseeable consequence of their conduct.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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